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(D)

No. 92-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JACQUELINE B. BRUNEAU,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Question Presented

The question presented is whether *D'Oench, Dhume & Co., v. FDIC*, 315 U.S. 447 (1942) or 12 U.S.C. §1823(e) abrogates the settled 100 year old rule that funds obtained from a depositor by a bank when it is ***hopelessly insolvent*** entitles the innocent depositor to rescind her "deposit" and recover the money from the bank's receiver, since such money never became an asset of the bank or receiver, but instead is held by the bank or receiver as a special deposit or as a constructive trust.

List of Parties

The petitioner and plaintiff below is Jacqueline B. Bruneau. The respondent and defendant below is the Federal Deposit Insurance Corporation. Bob A. Hardesty, Robert L. Karem, Raymond A. Lapino, Sr., and Myron Moorehead were defendants below and an appellants in the Fifth Circuit. Virginia Martinez and Juanita Barbaro were defendants in the district court.

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JACQUELINE BRUNEAU,

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FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jacqueline B. Bruneau ("Bruneau") petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which is reported at 981 F.2d 175 (5th Cir. 1992), is reprinted in Appendix ("App.") A. The Order and Reasons of the trial court, which is reported at 785 F.Supp. 585 (E.D. La. 1992), is reprinted in App. B.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1992. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

12 U.S.C. § 194 of the National Bank Act Provides:

> *Dividends on adjusted claims; distribution of assets.*
> From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such [national banking] association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

12 U.S.C. § 1823(e) provides:

> *Agreements against interests of [FDIC]*
> No agreement which tends to diminish or defeat the interest of the Corporation [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation [FDIC] unless such agreement --
> (1) is in writing,
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
(4) has been, continuously, from the time of its execution, an official record of the depository institution.

STATEMENT OF THE CASE

On December 5, 1988, Petitioner Jacqueline Bruneau took her life savings and purchased three certificates of deposit from Bankers Trust in Kenner, Louisiana.

Ms. Bruneau alleged in her complaint, at the time of the purchase, (1) the bank was hopelessly insolvent; (2) the bank officials were aware that the bank was hopelessly insolvent; (3) Ms. Bruneau's funds augmented the funds of the bank by the amount of the deposit; and (4) the cash or equivalents of the bank never fell below the amount of the "deposit."

On March 10, 1989, Bankers Trust was declared insolvent and the Respondent Federal Deposit Insurance Corporation ("FDIC") was appointed receiver for the bank. The FDIC paid Ms. Bruneau the sum of $100,000 (as and for the insured portion of her deposit) and issued her a Receiver's Certificate for $123,437.53 entitling Bruneau to share pro rata with other uninsured depositors and general creditors of the failed bank.

On December 1, 1989, Bruneau sued the FDIC to recover the remaining portion of her funds ($123,437.53). Subject matter jurisdiction was predicated on 12 U.S.C. §1819; 28 U.S.C. §1331 and § 1348. After she filed suit, the FDIC paid dividends to Ms. Bruneau in excess of $72,000 on her receiver's certificate. App. A 3.

The cornerstone of Ms. Bruneau's claim is that the bank was hopelessly insolvent when she deposited her funds. Bru-

neau argued that the acceptance of her funds by the bank when it was hopelessly insolvent constitutes a specific fraud entitling her to reclaim her funds, since under the hopeless insolvency doctrine a deposit made at a time when the bank is hopelessly insolvent does not vest title in the funds to the bank; rather, such funds are at the moment of deposit impressed with a trust in favor of the bank customer. Bruneau's funds, therefore, were held in constructive trust for her benefit, and were not assets of the bank when it failed. In these circumstances, petitioner contended that the ratable distribution under the National Bank Act, 12 U.S.C. § 194, did not apply because trust funds are not bank assets.[1]

Bruneau further contended that her claims were not based on an unrecorded side agreement or an agreement of any kind. Rather, her claims are based on the fact that the books and records of the bank show that the bank was hopelessly insolvent when the bank took her funds. As her claim is based on the books and records of the bank and ***not on any agreement*** with the bank, Bruneau argued that the federal common law doctrine of *D'Oench, Duhme*, 315 U.S. 447 (1947), and its statutory counterpart, 12 U.S.C. 1823(e)—which estop a person from enforcing unrecorded agreements against the bank—were inapposite.

In its motion for summary judgment, the FDIC did not challenge the factual sufficiency of plaintiff's case. The FDIC argued as a matter of law Bruneau's claims were barred.

The district court granted summary judgment to the FDIC. The court agreed with the FDIC's assertion that as a matter of law the facts as alleged by Ms. Bruneau were insuf-

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1. Bruneau also asserted other claims against the FDIC and other named defendants. App. B 10. The individual defendants were dismissed by the district court without prejudice. These other claims were not urged by her on appeal.

ficient to state a claim because the hopeless insolvency remedy she prayed for was not available. The court further found that even if the hopeless insolvency/constructive trust theory could be asserted, the *D'Oench, Duhme* doctrine and 12 U.S.C. §1823(e) bar recovery against the FDIC. Bruneau appealed pursuant to 28 U.S.C. § 1291.

The Fifth Circuit agreed with the district court finding the hopeless insolvency doctrine has "no contextual relevance in light of the banking reforms that have occurred in this country during the last sixty years." The Fifth Circuit also found that the *D'Oench, Duhme* doctrine and 12 U.S.C. §1823(e) barred petitioner's claims.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit decision in three paragraphs extends the FDIC's authority to take property free of any competing interests. In reaching its decision, the Fifth Circuit expands the reach of the federal common law *D'Oench, Duhme* doctrine to permit the FDIC to retain funds that it knows its predecessor illegally obtained when it was *hopelessly insolvent*, thereby scuttling the hopeless insolvency doctrine which for over 100 years has allowed depositors to reclaim deposits—if their funds were placed in a bank at a time in which the bank was hopelessly insolvent. The decision of the court of appeals thus applies the federal common law *D'Oench, Duhme* doctrine to a significantly new fact pattern that would apparently allow the FDIC to keep even defalcated funds, even if the FDIC knew from examination of the bank's books before the bank failed that these funds were purloined. In this new era of bank failures, the issues raised here are likely to recur.[2]

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2. The importance the court of appeals' decision is also demonstrated by the FDIC's petitioning the court to publish its opinion because of the novel application of the *D'Oench, Duhme* doctrine to an innocent depositor and because the decision overturns the "existing doctrine of hopeless insolvency." App. C 1.

THE DECISION BELOW STANDS ALONE AND CONFLICTS WITH FEDERAL AND STATE DECISIONS THAT HAVE ANALYZED THE REACH OF D'OENCH, DUHME

A. The Hopeless Insolvency Doctrine Is An Established Rule of Law

For over 100 years federal and state courts alike have held that acceptance of funds from a customer by a bank that is hopelessly insolvent constitutes a specific fraud to the bank customer entitling the customer to recover her funds. *See* Annot., 20 A.L.R. 1206 (1922) (and cases collected therein). Moreover, accepting deposits while hopelessly insolvent is the most common instance of "fraud" giving rise to a constructive trust. *See* 5 *Scott on Trusts* §529 (3d ed. 1967).

The specific fraud to depositors in a hopelessly insolvent circumstance is a wrong that is distinctively the depositors'; and it is a wrong that is not shared generally by all creditors of the bank. The hopelessly insolvent specific fraud is in sharp contrast to a general fraud committed by the bank that affects all creditors of the bank. An example of a general fraud is when the bank circulates to the public financial statements that are false. The Tenth Circuit has drawn a bright line between (1) the specific act of fraud inflicted upon a depositor in the hopeless insolvency context and (2) a generalized fraud on all the creditors of a bank. *Downriver Community Federal Credit Union v. Penn Square Bank, through its Receiver the Federal Deposit Insurance Corp.*, 879 F.2d 754 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 1112 (1990). In the hopelessly insolvent context, the Tenth Circuit reasoned that a depositor may rescind her deposit, whereas the victims of a generalized fraud must share ratably in the receiver's estate:

> **Those who deposit funds after a bank is hopelessly insolvent can show a specific act of fraud** that affects only them, and therefore they have a

> superior equitable position over others who deposited funds prior to hopeless insolvency with a hope or belief in the bank's future ability to repay the deposit. Furthermore, a hopelessly insolvent bank should have been closed by the Comptroller of the Currency as of the date of such insolvency, thereby preventing the receipt of further deposits. Equity therefore "regards that as done which should have been done," *O'Neal v. White*, 79 F.2d 835 (4th Cir. 1935), *cert. denied*, 297 U.S. 706, 56 S.Ct. 501, 80 L.Ed. 994 (1936), **and permits the rescission of deposit contracts made after the bank should have been closed.**

Downriver, at 879 F.2d. 762-63 (emphasis added).

Downriver, albeit in dicta, expressly described the existing validity of the constructive trust doctrine when applied in a case of hopeless insolvency. While the court of appeals in the case *sub judice* views the hopelessly insolvency doctrine as a "turn-of-the-century" legal atavism, *Michie On Banks and Banking*, at §§ 69 and 70 (1971) addresses the hopeless insolvency doctrine in the present tense and cites *Downriver* to support the treatise's main text with the following language: "A bank receiving deposits after its officers know that bank is hopelessly insolvent is deemed to commit fraud upon depositors, entitling them to reclaim their deposits." *Id.*, § 70 at n.69 (1992 Supp.).

Michie further states that an

> innocent depositor [who places funds in a hopelessly insolvent bank] may be protected, he is held entitled to a preference over general creditors. In other words the deposit is impressed with a trust in favor of the depositor. A return of this deposit cannot be attacked as a preference to creditors. The reason for the foregoing is that a deposit in a

> bank which is insolvent at the time does not vest title thereto in the bank and convert the depositor into a general creditor [footnotes omitted].

Id. at Ch. 6, 69 pp. 206-210.

A variant of the hopeless insolvency doctrine is also found in the Model Penal Code (1980), which provides:

> § 224.12: *Receiving Deposits in a Failing Financial Institution*
>
> An officer, manager or other person directing or participating in the direction of a financial institution commits a misdemeanor if he receives or permits the receipt of a deposit, premium payment or other investment in the institution knowing that:
>
> (1) due to financial difficulties the institution is about to suspend operation or go into receivership or reorganization; and
>
> (2) the person making the deposit or other payment is unaware of the precarious situation of the institution.

Louisiana has a similar statute. La. R.S.Ann. 6:419 (West 1986 & Supp. 1992) that provides:

> A. After an officer, director, or employee of a bank learns that the bank is insolvent, he shall not assent to the receipt of any deposit of which all or any portion thereof would not be insured by the Federal Deposit Insurance Corporation or the creation of any debt by the bank.
>
> B. Whoever violates this Section shall be fined not more than one thousand dollars and shall be individually responsible for any such deposit or debt.

This statute was originally enacted in 1870. It has been re-enacted and amended several times, most recently in 1987. In the first note of the annotations to this statute, the annotator excerpts the holding in *Richardson v. New Orleans Debenture Redemption Co.*, 102 F. 780, 782 (5th Cir. 1900), as follows: "When a bank receives a deposit after hopeless insolvency, the fraud avoids the implied contract between the parties by which the relationship of debtor and creditor would ordinarily arise, and prevents the money deposited from becoming the property of the bank, and a trust is the equitable result." *Richardson* is of course a federal decision. The result under Louisiana state law, however, is no different. *See, e.g., In re Bank of Whitecastle*, 167 La. 555, 558, 119 So. 872 (1929). Whether federal common law is employed or Louisiana law applies the result is the same: petitioner is entitled to reclaim her funds.

B. The Decision Below Conflicts With Other Courts Of Appeal And State Courts In Its Application Of The D'Oench, Duhme Doctrine

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) held that when the FDIC acquires a note from a failed financial institution, the borrower cannot base a defense on the ground of an unrecorded or "secret" side agreement. In 1950, Congress enacted 12 U.S.C. § 1823(e). Section 1823(e) bars claims or defenses asserted against the FDIC based on any agreement that tends to diminish or defeat the interest of the [FDIC] in any asset acquired from a failing or failed institution. The agreement is invalid unless it (1) is in writing, (2) was executed by the institution at the time the institution acquired the asset, (3) was approved by the institution's board of directors or loan committee, and (4) has continuously been an official institution record.

In the half century since *D'Oench, Duhme* was decided, federal common law has expanded the scope of what has

become known as the *D'Oench, Duhme* doctrine to cover a wide variety of claims and defenses based on unrecorded agreements. But the *D'Oench, Duhme* doctrine or Section 1823(e) has not been expanded to estop a depositor's claim in the hopeless insolvency context. Thus, throughout the past century, courts have awarded constructive trusts against national bank receivers based on the hopeless insolvency doctrine, and Congress has never sought to restrict the availability of that remedy despite numerous amendments to the National Bank Act.

i. D'Oench, Duhme And § 1823 Are Not Applicable Where There Are No Unrecorded Agreements Or Where The Bona Fides Of A Party's Claims Appear On The Bank's Records.

Federal courts in applying *D'Oench, Duhme* doctrine have repeatedly held that the doctrine does not preclude defenses where the terms that "tend to diminish" the FDIC's rights, and upon which the defenses are based, appear in the bank's records or where there is no undocumented side agreement. *See, e.g., Baumann v. Sauers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1517 (11th Cir. 1991) (*D'Oench, Duhme* doctrine does not bar defenses evident from the documents at issue). *See also FDIC v. Sather*, 488 N.W.2d 260 (Minn. 1992). Since *D'Oench, Duhme* does not bar *defenses* in these circumstances, it follows with equal force that *D'Oench, Duhme* does not bar *depositor claims* based on the records of the bank and not upon separate, side agreements with the bank.

It also is noted that in the hundreds of cases decided since *D'Oench, Duhme* was decided and the enactment of 12 U.S.C. 1823(e), only one case, with facts a far cry from this one, has been discovered where the doctrine or its statutory counterpart provided the decisional basis to ***estop a depositor's claim.*** *North Arkansas Medical Ctr. v. Barrett*, 962 F.2d

780, 787 (8th Cir. 1992) (hidden liability created by a depositor's "hidden security agreement," *i.e., Barrett* concerned a depositor claim grounded in a collateral agreement with the bank, whereas petitioner's claim does not concern any "agreement" between bank and customer).

The *D'Oench. Duhme* doctrine protects bank regulators by excluding unrecorded side agreements not reflected in the institution's records. While the definition of "secret agreements" has been expanded in recent years, application of the doctrine still depends in the first instance on the existence of an "off-the-books" agreement. The Eleventh Circuit articulated the standard:

> Whether a borrower's defense is barred by the *D'Oench* doctrine depends upon whether the purported agreement relied upon by the private party was ever memorialized in writing or otherwise made explicit such that the FSLIC or the FDIC would have knowledge of the Bank's obligations during an evaluation of the bank's records. If the bank's records reveal that the bank has agreed to certain additional obligations, then the *D'Oench* estoppel doctrine would not preclude a borrower's claim that the bank had not satisfied those additional obligations.

FDIC v. Gordy, 928 F.2d 1558, 1563 (11th Cir. 1991), citing *FDIC v. McCullough*, 911 F.2d 593, 600 (11th Cir.1990) *cert. denied* 111 S.Ct. 2235 (1991). Where the borrower's obligations are explicit in the bank's books or where a depositor has placed funds in a hopelessly insolvent bank so that the FDIC will know the nature of the borrower's transaction or true status of the bank customer's deposit during an evaluation of the bank, *D'Oench, Duhme* is inapplicable. *See id.* at 1564. This is consistent with the policy behind the doctrine. The doctrine permits federal and state

banking examiners to rely on an institution's records in evaluating its fiscal condition. *Langley v. FDIC*, 484 U.S. 86, 96 (1987); *FDIC v. Gordy*, 928 F.2d at 1563.

Recent federal decisions affirm that *D'Oench Duhme* is not applicable to estop claims which do not depend on unrecorded side agreements or unwritten representations. For example, in *Resolution Trust Corp.v. Wellington Development Group*, 761 F.Supp. 731 (D. Colo. 1991), the RTC moved to dismiss a borrower's counterclaim that the bank had misapplied funds by failing to apply payments to reduce the borrower's loan balance. The court refused to strike the counterclaim, finding that it could "be resolved based on documentation and correspondence on file, without reference to oral agreements or understandings." *Id.* at 738 (footnote omitted). *See also Empire State Bank v. Citizens State Bank of Fulda*, 932 F.2d 1250, 1252 (8th Cir. 1991) (claims against FDIC based on dummy notes not barred because they were not based upon any "off the-books agreement"). *Dollar Fed. Sav. Bank v. Green Tree Acceptance, Inc.*, No.4-90 37S, 1991 WL 40398 at 2 (D. Minn. March 21, 1991) (*"D'Oench, Duhme* doctrine and § 1823(e) *do not preclude parties from asserting claims against a failed bank which are based on a recorded agreement"*). *See also FDIC v. Sather*, 488 N.W.2d 260 (Minn. 1992) (claims not based on collateral agreement are not precluded by *D'Oench, Duhme* or §1823(e)).

D'Oench, Duhme only estops claims based on a banking transaction not reflected in the bank's books and records. Rather than using the *D'Oench, Duhme* doctrine or §1823(e) to bar claims arising from unrecorded agreements, the court of appeals' decision *bars Bruneau from relying on the bank's own books and records to prove her case.* This is not justified by any policy behind the *D'Oench Duhme* doctrine. *D'Oench, Duhme* cannot bar claims or defenses, such as Ms. Bruneau's, that draw their legal and evidentiary underpinnings from the

books and records of the failed bank as opposed to some secret agreement or unrecorded agreement.

Neither *D'Oench, Duhme* nor § 1823(e) should bar the claims of an innocent depositor to reclaim funds placed in a hopelessly insolvent bank—since these trust funds remain the property of the customer and are not "assets" of the bank and because the claim is not based on an "agreement." *D'Oench, Duhme* has generated a steady stream of "substantial, conflicting, and sometimes confusing body of case law in which the arguments of both parties and the decisions of both courts have found support," *FDIC v. Sather*, 488 N.W.2d 260, 262 (Minn. 1992), making it difficult for the bench and bar to gauge the outer limits of FDIC power. This unsettled state of the law makes it desirable for this Court to reexamine *D'Oench, Duhme* estoppel so that litigants and the lower courts may be guided as to the present reach of this doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted.

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February 1993

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 92-3256

JACQUELINE B. BRUNEAU,

Plaintiff-Appellant,

Cross-Appellees.

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,

As Receiver for Bankers Trust, N/A., ET AL.,

Defendant-Appellees.

ROB A. HARDESTY, ROBERT L. KAREM, RAYMOND A. LAPINO, SR., and MYRON E. MOOREHEAD,

Defendants-Appellees,

Cross-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:

In this appeal from the district court's grant of summary judgment in favor of Defendant-Appellee Federal Deposit

Insurance Corporation (FDIC), Plaintiff-Appellant Jacqueline B. Bruneau asserts that the district court misapplied the law of constructive trust, the holding in *Downriver Community Federal Credit Union v. Penn Square Bank*[1] and the *D'Oench, Duhme* doctrine.[2] As we find the district court's decision to be free of reversible error, we affirm.

I
FACTS AND PROCEDURAL HISTORY

In early December 1988, Bruneau opened three accounts at Bankers Trust of Louisiana (Bankers Trust) and made deposits into all three totaling of $223,125.76. Bruneau asserts that an employee of the bank represented that the three accounts would be insured up to $100,000 each by the FDIC, and that Bruneau thus believed that all of her money was insured.[3] For purposes of this review, we assume the truth of those representations by Bruneau.

In early March 1989, the Comptroller of Currency declared Bankers Trust insolvent and terminated its existence as a national banking association.[4] The Comptroller appointed the FDIC as receiver of Bankers Trust.

Bruneau filed a claim for recovery of her deposits with the FDIC. The FDIC paid Bruneau $100,000 and issued her a Receivers Certificate for the additional $123,473.53, entitling her to a ratable distribution along with other uninsured depositors and general creditors. Since obtaining the Receiv-

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1. 879 F.2d 754 (lot Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

2. *See D'Oench Duhme & Co. v. Federal Deposit Ins. Co.*, 315 U.S. 447, 460 (1942).

3. This was clearly incorrect. 12 C.F.R. §330.5 (1989) provides: "Funds owned by natural persons and deposited in one or more deposit accounts in his or her own name shall be added together and insured up to $100,000 in the aggregate."

4. *See* 12 U.S.C.§191 (1988).

ers Certificate, Bruneau has received a number of payments from the FDIC. When the district court rendered its decision in the instant case, these payments totaled $59,817.82. The FDIC asserts that four more payments- totaling $12,936.26 - were made after the court's last calculation date and were thus not included in the $59,817.82 amount.

Unhappy with her share of the proceeds of the bank distribution under the National Banking Act, Bruneau sued the FDIC and several former officers and employees of the bank (Hardesty et al.), who she alleged made the misrepresentations to her. Bruneau claimed that the FDIC, by its predecessors, had breached its fiduciary duty to her, had violated Louisiana statutory law, had committed "concerted tort action" with some of the employees of the bank, and had effectively created a constructive trust in her favor.

The district court granted summary judgment in favor of the FDIC. The court reasoned that the Bruneau's constructive trust theory did not constitute a viable claim for a number of reasons. One of those reasons was that the claims were barred by the *D'Oench, Duhme* doctrine. The court held that Bruneau's other claims were barred by the *D'Oench, Duhme* doctrine and§1823(e) of FIRREA.[5] Bruneau timely appealed.

II
ANALYSIS

A. *Bruneau's Claims*

1. Effect of *D'Oench, Duhme*

The district court relied on several theories in rejecting all of Bruneau's claims. One of the theories properly espoused by the district court here is that Bruneau's claims are barred by the *D'Oench, Duhme* doctrine. The district court found correctly that all of the claims are based on bank personnel's

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5. 12 U.S.C.§1823

misrepresentations and fraudulent acts, all of which, for purposes of this appeal, we assume to have occurred. Under *D'Oench, Duhme* and its statutory counterpart, a claimant against the FDIC must produce evidence that the agreement made with the bank meets all of the FIRREA requirements.[6] As the district court found, ***none*** of these requirements were met by Bruneau. The agreement was ***not*** in writing; it was ***not*** executed by the depository institution contemporaneously with the acquisition of the asset; it did ***not*** have the required approval of bank executives; and it was ***not*** continuously held as an official bank record.

Bruneau asserts in her brief to this court that "D'Oench, *Duhme* is not apposite. Ms. Bruneau is not basing her claim for recovery on the ground of a secret or side agreement, but rather on the ground that this transaction never could occur because the bank was prohibited from taking funds, thereby making this transaction void from the beginning."[7] Bruneau badly mischaracterizes her position. Her entire case rests on the theory that the officers of the bank committed a fraud by

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6. The relevant portion of FIRREA provides:
No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 11 [12 U.S.C.S.§1821], either as a security for a loan or by purchase ***or as a receiver of any insured depository institution***, shall be valid against the Corporation unless such agreement -
(1) is in writing,
(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
(3) was approved by the board of directors of the depository institution or its loan committee,... and
(4) has been, continuously, from the time of its execution, an official record of the depository institution. 12 U.S.C.S.§1823(e) (Supp. 1992).

allowing her to deposit money when they knew the bank was insolvent. The *D'Oench, Duhme* doctrine and§1823(e) are directly implicated by a fraud accusation. Without meeting the requirements of either, Bruneau's claims are barred.

2. Hopeless Insolvency

Bruneau's other argument involves the hopelessly outdated "hopeless insolvency" doctrine, which was recently discussed in dicta of the Tenth Circuit in the *Downriver* decision.[8] The district courts opinion ably explains the effect of the hopeless insolvency doctrine, the dicta in the *Downriver* decision, and everything else relative to this essentially frivolous ground of appeal. We refuse to expend any more judicial resources trying to convince counsel that this turn-of-the-century doctrine has long since ceased to have any contextual relevance in light of the banking reforms that have occurred in this country during the past sixty years.

B. *The Cross-Appeal of Hardesty et al.*

After the dismissing the FDIC with prejudice, the district court turned to the state law claims that had been filed by Bruneau against Hardesty et al. As to these claims, the court stated:

> The remaining claims are for "intentional misrepresentation" (First Claim), "negligent misrepresentation" (Second Claim), "breach of fiduciary duty" (Fourth Claim), "violation of Louisiana Revised Statutes" (Fifth Claim), [and] "concerted tort action" (Sixth Claim). Each is based in Louisiana law, albeit as to the fifth claim, some of the

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7. We like the district court before us, will ignore the gaping hole in Bruneau's logic that if there was no deposit ("th[e] transaction never could occur"), the FDIC would be responsible for *nothing* because its liability is triggered only by deposits

8. 879 F.2d at 761-63.

> defendants have filed a motion based on preemption of state law.

The court then held that it was without subject matter jurisdiction and declined to exercise pendant jurisdiction over the remaining parties. It then dismissed Bruneau's claims against Hardesty *et al.* without prejudice.

Seeking to change the dismissal from one without prejudice to one with prejudice, Hardesty et al. assert on appeal that the district court erred in dismissing their claims for lack of subject matter jurisdiction. They ground their appeal on the theory that the Louisiana statute involved in Bruneau's charge of "violation of Louisiana Revised Statutes"[9] is preempted by federal banking law and that the preemption in and of itself supports federal question jurisdiction. Alternatively, they argue that the district court should have addressed the state law claims under its pendant jurisdiction. We dismiss out-of-hand the assertion that the district court abused its discretion in not exercising pendant jurisdiction over the state law claims.

It is clear from the opinion of the district court that it dismissed Bruneau's claims against Hardesty et al. without considering the claim of federal question jurisdiction arising from the preemption of state law. This refusal to consider the claim does not place the issue beyond our review, however, as the preemption question is a matter of law that we would review t nova if it had been fully considered by the district court.

Federal preemption most often appears as a defense to a plaintiff's claim. Thus, the "federal issue does not appear on the face of the plaintiff's complaint."[10] Consequently, a pre-

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9. La. Rev. Stat. Ann.§6:419 (West 1986 & Supp. 1992).
10. *Lister v. Stark*, 890 F.2d 941. 943 (7th Cir. 1989), *cert. denied*, 111 S.Ct. 579 (1990).

emption defense cannot be the basis of the original federal jurisdiction.[11]

As noted by the Seventh Circuit, the Supreme Court has fashioned a narrow exception to this rule. The preemption defense can "be the basis of the original federal jurisdiction" when

> Congress has completely preempted a given area of state law. This "complete preemption" exception permits recharacterization of a plaintiff's state-law claim to a federal claim ....[12]

Hardesty et al. thus assert that §6:419 of the Louisiana Revised Statutes has been preempted by federal banking regulations to the point that the asserted violation of that statute is no more than a federal claim masquerading as a state claim. We disagree.

In *Metropolitan Life Ins. Co. v. Taylor*,[13] the Supreme Court found that "ERISA's preemption provision is... so strong that every claim for benefits under a covered plan is regarded as arising under the laws of the United States."[14] Similarly, "[i]t has long been recognized that section 301 of the Labor Management Relations Act, 29 U.S.C.§185, has such preemptive force."[15] To determine whether the statute has such preemptive force, there must be evidence of "'the

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11. *Id.* (discussing jurisdiction sufficient to make removal proper) (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987)); *see Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

12. *Id.*

13. 481 U.S. at 63.

14. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir.) *cert. denied*, 111 S.Ct. 308 (1990).

15. *Id.*

clearly manifested intent of Congress' such preemption occur.[16]

In the instant case, no evidence of congressional intent to preempt the area of law so pervasively has been presented to this court. Instead, Hardesty et al. have thoroughly convinced us that a *defense* of preemption exists in this context. They point to a case from the Eastern District of Louisiana involving the same bank failure and the same defendants as the instant case, in which they successfully used preemption as a defense to similar claims.[17] Hardest et al. now assert that "[t]he precise issue now before the court has already been resolved in favor of defendants/cross appellants" in the *Mortgage Market* case. Clearly, Hardesty et al. misapprehends the distinction between that which was decided in *Mortgage Market* and that which they presently urge to us.

In *Mortgage Market*, the district court held that "federal law preempts [sic] application of La.Rev.Stat.§6:419 or state fiduciary law which would hold Hardesty, et al [sic] liable for the uninsured portion of [the plaintiff]'s certificate of deposit"[18] As irrefutable a proposition of law as that may be, it is entirely different from the present assertion by Hardesty et al. cites nothing to this court (and our research reveals nothing) to indicate that Congress intended to "treat a complaint raising [these matters] as 'necessarily federal in character.'"[19]Simply put, Hardesty et al.'s demonstration that the defense of preemption applies does not create a basis for subject matter jurisdiction in the same manner as does "superpreemption" of an ERISA provision or section 301 of the LMRA. Hardesty et al. thus fail to convince us that such "superpreemption" exists here.

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16. *Id.* (quoting *Taylor*, 481 U.S. at 67).

17. *Mortgage Mkt., Inc. v. Federal Deposit Ins. Corp.*, 780 F.Supp. 406, 407-08 (E.D. La. 1991).

18. 780 F.Supp. at 408.

19. *Trans World Airlines*, 897 F.2d at 787.

Hardesty et al.'s claims may well have merit; they have merely been asserted in the wrong place. The district court dismissed the claims against Hardesty et al. without prejudice. Even though the federal preemption cannot sustain federal subject matter jurisdiction, it may be asserted in an effort to fend off any state court claims against these defendants.

III
CONCLUSION

We are not impressed with Bruneau's assertions of error by the district court. Unavoidably, the *D'Oench, Duhme* doctrine bars the claims asserted by wren against the FDIC. The district courts analysis of the "hopeless insolvency" doctrine and the dicta found in the *Downriver* decision to the instant case was correct. And the district court did not abuse its discretion in refusing to exercise pendant [sic] jurisdiction over the state law claims against Hardesty et al. The district court's judgment is thus

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No.89-5195

JACQUELINE B. BRUNEAU,
Plaintiff
VERSUS
FEDERAL DEPOSIT INSURANCE CORP.
AS RECEIVER FOR BANKERS
TRUST, N.A., ET AL.
Defendants.

[Filed February 21, 1992]

ORDER AND REASONS

A motion for summary judgment on behalf of the Federal Deposit Insurance Corporation, as Receiver of Bankers Trust of Louisiana, N.A. (the "Receiver") (Doc. 51), and a motion for summary judgment on behalf of Bob A. Hardesty, Raymond A. Lapino, Sr., Myron E. Moorehead, and Robert L. Karem[1] (the "Directors") (Doc. 41) were filed and taken on the papers. Having reviewed the pleadings, affidavits, documents and the applicable law, the Court finds merit in the Receiver's motion and dismisses the remaining claims for lack of subject matter jurisdiction.

FACTS

Prior to March 10, 1989, Bankers Trust of Louisiana, N.A. was a national banking association organized and existing under the laws of the United States. 12 U.S.C. §21 *et seq.* The affairs of Bankers Trust were subject to the supervision and control of the Comptroller of the Currency (the "Comptroller"), and agency of the Treasury Department of the United States. (Uncontested Fact No. 1).

On or about December 5, 1988, the plaintiff, Jacqueline B. Bruneau ("Bruneau") read an advertisement placed by Bankers Trust in the *Times Picayune* of New Orleans setting forth the interest rate on Bankers Trust's Certificates of Deposit. The advertisement also represented that Bankers Trust was insured by the Federal Deposit Insurance Corporation (the "FDIC"). Relying on the fact that Bankers Trusts advertised rates were "good" and that it was insured by the FDIC, she decided to deposit $223,125.76 with the bank. (Uncontested Fact No. 2).

Moreover, Bruneau contends that Juanita Barbaro, an employee of Bankers Trust, informed her that each separate certificate of deposit would be insured for $100,000.00, that she relied on the representation of Ms. Barbara, that on December 5, 1988, she deposited her funds in three separate "CDs" under three names: (No. 13209, Jacqueline Bruneau, $100,000.00; No. 13208, Jacqueline B. Bruneau, $100,000.00; No. 13310, Jacqueline Blancq Bruneau, $23,125.67) believing that each would be fully insured and believing that the Bankers Trust was solvent. For purposes of this motion, the Receiver for Bankers Trust does not contest

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1. Robert A. Karem's name was inadvertently left out of a motion to dismiss filed on behalf of Hardesty, Lapino and Moorehead. (Doc. 41). Counsel filed and adopted that motion on behalf of Karem by motion. (Doc. 50).

these contentions. Accordingly, for purposes of the FDIC motion only, the Court will accept these allegations as true.

At the close of business on March 10, 1989, the Comptroller declared Bankers Trust to be insolvent pursuant to 12 U.S.C. § 191 and terminated its existence as a national banking association. The Comptroller subsequently appointed the FDIC as Receiver for Bankers Trust pursuant to 12 U.S.C. §§191, 1821(c), whereupon the FDIC assumed the duties of Receiver and took possession and control of the assets, the property and the affairs of Bankers Trust. (Uncontested Fact No. 3).

FDIC records show that Bankers Trust had 138 uninsured deposit accounts as of March 10, 1989. Of these deposits, 125 were held in certificates of deposit. (Uncontested Fact No. 4).

Following the closure of Bankers Trust, Bruneau filed a claim with the FDIC for the recovery of her deposits. The FDIC paid Bruneau the sum of $100,000.00 (that insured portion of her deposit) and issued her a Receiver's Certificate for $123,437.53 (the remaining amount) entitling Bruneau to share pro rat with other uninsured depositors and general creditors of Bankers Trust. (Uncontested Fact No. 5).

Bruneau has received a number of dividend payments. They are as follows:

March 8, 1990	$49,375.01
February 11, 1991	$7,159.37
May 31, 1991	$2,172.50
June 13, 1991	$419.69
July 29, 1991	$691.25

The first check may have been endorsed under protest

with a reservation of rights. There was also a payment in August, however, the Court has not been apprised of its amount. As a result of these payments, Bruneau has received at least $59,817.82 of her $123,437.53 claim. (Uncontested Fact No. 7).

Advertisements placed by Bankers Trust in the *Times Picayune* were not recorded in the official records of Bankers Trust. (Uncontested Fact No. 8).

RECEIVER'S MOTION

The Court will first address the Receiver's motion and its theories. Receiver contends that the D'Oench, Duhme doctrine[2] and its statutory counterpart[3] bar plaintiff's suit. Receiver also argues that plaintiff's "constructive trust" theory should not be recognized because, inter alia, it reflects neither current nor Louisiana law and is inconsistent with the statutory scheme controlling recovery of an unsecured claim with respect to the Receiver. Finally, because plaintiff has accepted the distributions, she has waived her claims and they are rendered moot. The Court will address the constructive trust theory first.

Constructive Trusts and Downriver

Plaintiff's claim against the FDIC as Receiver rests on her allegations (1) that an employee officer of Bankers Trust told Ms. Bruneau that each of her certificates of deposit would be insured for $100,000.00 by the FDIC, (2) that she relied on this misrepresentation, (3) that she further relied on an implicit misrepresentation that Bankers Trust was solvent, (4) that because these two statements were fraudulent, that a debtor/creditor relationship, was no created. Rather, plaintiff

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2. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S. Ct. 676 (1942).

3. 12 U.S.C. §1823(e).

argues that as a result of this "fraud", a constructive trust was created on Ms. Bruneau's behalf. Plaintiff cites to Richardson v. New Orleans Debenture Redemption Co., 102 F. 780 (5th Cir. 1900) in support of this proposition.

Plaintiff contends that this trust would place her claim beyond the statutory and regulatory framework delineated by Congress for the pro rat distribution of assets to uninsured depositors as delineated by the National Bank Act, 12 U.S.C. §21 *et seq.*, the Federal Deposit Insurance Act, 12 U.S.C. §1811 *et seq.*, and the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") in 12 U.S.C. §§1821, 1823.

This concept was specifically rejected by the United States Court of Appeals for the Tenth Circuit in Downriver Community Fed. Credit Union v. Penn Square Bank, 879 F.2d 754 (lst Cir. 1989), cert. denied, 110 S. Ct. 1112 (1990), and frankly, this Court is perplexed by plaintiff's reliance on dicta in a case which specifically rejects plaintiff's contentions.

The Tenth Circuit refused to graft onto the National Bank Act Oklahoma's statute providing for a constructive trust "because to do so would permit a constructive trust in favor of plaintiffs in contravention of the principles implicit in the National Bank Act." That court specifically found that because the FDIC, as the receiver of a national bank, was a party to the suit, under 12 U.S.C. §1819(b)(2)(A), all claims against the receiver's estate were governed by federal law. It refused to look to Oklahoma law because it would defeat the National Bank Act's "system of equal distribution." As the court stated:

> Here, we must utilize governing principles that are in conformity with the policies underlying the

> National Bank Act. Most important to this case are the policies of achieving the "equity of equality among creditors," and of the orderly liquidation of the receiver's estate, that are implicit in 12 U.S.C. §91, 194.

Downriver, 879 F.2d at 761 (citations omitted).

In Downriver, plaintiffs had specifically relied on financial statements that contained material misrepresentations which management and directors knew were false or misleading with respect to the insolvent institution, Penn Square Bank. Plaintiffs claimed that under the constructive trust theory, their deposits should be returned. However, the Court rejected these claims and underscored that such a recovery violates both of the federal policies (equality among creditors and orderly liquidation of estate) implicit in the National Bank Act. Id. at 763.

Likewise, in this instance, the Court will not use the constructive trust theory to improve Bruneau's position. In order to recognize a constructive trust, the analysis begins at the inception of the deposit. Plaintiff's theory is that because of the fraud, there really is no deposit, and the money is held in a constructive trust.[4] Since one looks at that point in time, state law controls the analysis. Downriver, 879 F.2d at 758. However, under Louisiana law, constructive trusts are not recognized. In re Emerald Oil Co., 807 F.2d 1234, 1238 (5th Cir. 1987); In re Latham Exploration Co., 83 B.R. 423, 426-27 (W.D. La. 1988); Prudential Ins. Co. of America v. Harris, 748 F. Supp. 445, 448 (M.D. La. 1990). Thus, there

4. This theory presents somewhat of a puzzlement, since, of course, if there was no deposit, then there was no FDIC insurance applicable to plaintiff's account. The FDIC insurance applied only to deposit. The Court note thin conundrum, but proceeds nonetheless with It analysis of plaintiff's theory.

is no state law which this Court could look to create such a remedy.

Furthermore, the federal interest in maintaining the orderly distribution of the receivership estate overrides the interests of an individual depositor such as the plaintiff. The Court will not endeavor to eviscerate the statutory scheme which Congress has so carefully devised. Under 12 U.S.C. §1821(i), FIRREA specifically states:

> Notwithstanding any other provision of Federal law of the law of any State..., this subsection shall govern the rights of the creditors (other than insured depositors) of such institution.

As stated by Congressman Wylie, Ranking Minority Member of the House Banking Committee in discussing the provision of §1821(i):

> Title II includes a provision codifying the FDIC's current practice, which has been upheld by the courts, with respect to the valuation of claims against financial institutions in default. This provision embodies the very simple and straightforward principle that creditors of an insolvent institution are entitled to only their pro rat share of the value of a failed institution's assets.

135 Cong. Rec. H4975 (daily e. August 3, 1989). Based on this analysis, plaintiff's claim against the FDIC is without merit. Even if this were not the case, under D'Oench, Duhme and section 1823(e) of Title 12 of the United States Code, these claims are barred.

D'OENCH, DUHME AND SECTION 1823(e)

The linchpin of plaintiff's suit is the fact that an oral representation or agreement was made between Bankers Trust and Ms. Bruneau. She agreed to deposit her funds based on

Bankers Trust's assurance that each certificate of deposit was insured by the FDIC which was in direct contravention of the FDIC regulations.[5]

In order for plaintiff to maintain this action against the FDIC, the agreement in question must meet the requirements of 18 U.S.C. §1823(e).[6] See 18 U.S.C. §1821(d)(9). None of these provisions are met. Since the "agreement" was not signed by plaintiff and Bankers Trust, approved by Bankers Trust's board of directors, and made an official record of the bank, it fails to meet any of §1823 (e)'s requirements. Calico v. First National Bank of Bogata, 734 F. Supp. 768, 770 (E.D. Tex. 1990). Therefore, §1823(e) bars the enforcement of any "agreement" based on Bankers Trust's representations.

Plaintiff contends that this statute has never been used to deny a depositor's claims and should not be so employed by this Court. However, the Court recognizes that this statute has been used in numerous situations, other than the failed bank/borrower litigation which was its genesis. It has been applied to insurance policies, FDIC v. Gulf Life Ins. Co., 737 F.2d 1513 (lath Cir. 1984); to executive compensation plans, Belsky v. First National Life Ins. Co., 653 F.Supp. 80 (D. Neb. 1986); to loan participation agreements, FDIC v. Merchants National Bank, 725 F.2d 634 (lath Cir. 1984), among many agreements.

As was recently stated by the United States Court of Appeals for the Fifth Circuit, citing to Langley v. FDIC, 484 U.S. 86, 108 S. Ct. 396 (1987):

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5. See 12 C.F.R. §330.5. "Funds owned by a natural person and deposited in one or more deposit accounts in his or her own name shall be added together and insured up to $100,000 in the aggregate."

> "[o]no purpose of 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Often such an evaluation must be done literally overnight. For this reason the Supreme Court has been unwilling "to engraft an equitable exception upon the plain terms of the statute." Though they deny it, this is exactly what the defendants have asked us to do. We too must decline the request and hew closely to the "plain terms of the statute."

Resolution Trust Corp. v. McCrory, No. 91-1079, slip O. at 1758 (5th Cir. January 15, 1992) (citations omitted). Likewise, this Court will decline the same invitation.

Based on the foregoing, the Court finds sufficient reason to dismiss this claim with prejudice without the need to address any of the copious other arguments raised by either party.

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6. 12 U.S.C. S 1823(e) provides:
No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement--
(1) is in writing,
(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
(3) was approved by the board of directors of. the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
(4) has been, continuously, from the time of its execution, an official record of the depository institution.

PLAINTIFF'S PENDENT STATE LAW CLAIMS

Having dismissed the FDIC from this matter, the Court reviews the remaining parties and claims. The following persons remain as defendants: Robert Karem, Raymond Lapino, Virginia Martinez, Bob Hardesty, Juanita Barbaro, and Myron Moorehead. Based upon the representations made in the amended complaint (Doc. 5), each of these individuals resides in the Eastern District of Louisiana as does the plaintiff. Therefore, there exists no basis for diversity jurisdiction. Unless, the remaining claims sound in federal law, the Court is without jurisdiction.

The remaining claims are for "intentional misrepresentation" (First Claim), "negligent misrepresentation" (Second Claim), "breach of fiduciary duty" (Fourth Claim), "violation of Louisiana Revised Statutes" (Fifth Claim), "concerted tort action" (Sixth Claim). Each is based in Louisiana law, albeit as to the fifth claim, some of the defendants have filed a motion based on preemption of state law.

Nonetheless, the Court is without subject matter jurisdiction and declines to exercise pendant jurisdiction over the remaining claims.[7] To do so would not dispose of the entire matter, and it is in the interest of judicial economy that the remaining issues be dealt with in their totality.

When federal law claims in an action based on federal question jurisdiction are eliminated and only state law claims remain, the federal court should not continue to exercise jurisdiction. Federal courts may relinquish jurisdiction by either dismissing the case without prejudice or in cases that have been removed, by remanding the case to state court. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 108 S. Ct.

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7. Furthermore, since this civil action was commenced prior to December 1, 1990, supplemental jurisdiction authorized under 28 U.S.C. S 1367 unavailable.

614 (1988). The United States Supreme Court in United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966), stated:

> Needless decisions of state law should be avoided both as a matter of commit and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state law claims should be dismissed as well.

This case was filed in federal court thus the Court cannot remand a case that was not initially removed. Accordingly,

IT IS ORDERED that the FDIC's motion for summary judgment is GRANTED and plaintiff's claims against the FDIC as Receiver are DISMISSED with prejudice.

IT IS FURTHER ORDERED that plaintiff's remaining clams are DISMISSED without prejudice.

New Orleans, Louisiana, this 20th day of February, 1992.

/s/George Arceneaux, Jr.
George Arceneaux, Jr.
United States District Judge

APPENDIX C

FDIC
Federal Deposit Insurance Corporation
Washington D.C. 20429

December 9, 1992

Richard Windhorst
United States Court Of Appeals
600 Camp Street
New Orleans, LA 70130

Re: Bruneau v. FDIC, No. 92-3256
Dear Sir:

Pursuant to Circuit Rule 47.5 counsel for the Federal Deposit Insurance Corporation requests the panel reconsider its decision not to publish its decision in the above-referenced case, filed on November 12, 1992.

First the application of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942) and 12 U.S.C. § 1823(e) in the context of a suit brought by a depositor of a failed financial institution which involves a deposit insurance determination by the Federal Deposit Insurance Corporation represents application of an established rule of law to facts significantly different from those in previous publishes opinions applying the rule. Second, the decision criticizes application of the existing doctrine of hopeless insolvency in light of more recently enacted banking reforms. These two grounds meet the criteria for publication set forth in Circuit Rule 47.5.1.

Enclosed are three addition copies of this letter for distribution to the panel. Thank you for your consideration of this request.

Very truly yours,

/signed/

Joan E. Smiley

Counsel

Federal Deposit Insurance

Corporation

cc: Robert S. Abdalian, Esquire

Supreme Court, U.S.
FILED
APR 29 1993
OFFICE OF THE CLERK

No. 92-1368

In the Supreme Court of the United States

OCTOBER TERM, 1992

JACQUELINE B. BRUNEAU, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether federal law limits petitioner's recovery of the uninsured portion of her deposits in a failed bank to her pro rata share of the receivership assets of that bank.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 981 F.2d 175. The opinion of the district court (Pet. App. B1-B11) is reported at 785 F. Supp. 585.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1992. The petition for a writ of certiorari was filed on February 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1988, petitioner opened three accounts at Bankers Trust of Louisiana with funds totalling $223,125.76. According to petitioner, an employee of Bankers Trust incorrectly advised her that the Federal Deposit Insurance Corporation (FDIC) would insure each of the accounts for up to $100,000. After Bankers Trust failed and the Office of the Comptroller of the Currency appointed the FDIC as receiver, petitioner filed a claim for the funds she had deposited. The FDIC paid her $100,000 (the insured portion of her deposits) and issued her a Receiver's Certificate for the remaining amount due ($123,437.53, including interest), which entitled her to share pro rata with other uninsured depositors and general creditors of Bankers Trust. She subsequently received dividends of $85,037.35 from the receivership estate. Pet. App. A2-A3; B2-B4.[1]

2. Petitioner brought this action against the FDIC as receiver for Bankers Trust, seeking to recover the uninsured portion of the three certificates of deposit.[2] Petitioner argued that oral

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[1] At the time the case was submitted to the court of appeals, petitioner had received $72,754.08. See Pet. App. A3. The FDIC has advised us that it has made subsequent disbursements to petitioner of $3,234.06 (on December 31, 1992), $8,964.03 (on April 2, 1993), and $85.18 (on April 6, 1993). The outstanding amount on her uninsured deposit thus stands at $38,400.18.

[2] Petitioner also sued various individual defendants, whom she alleged were directors, officers, controlling persons, or employees of the bank. Petitioner voluntarily dismissed some of those defendants, and the district court dismissed the claims against the remaining defendants without prejudice. Pet. App. B10-B11. The court of appeals affirmed. Pet. App. A5-A9.

representations made by an employee of Bankers Trust had induced her to deposit funds at a time when the former management of the bank knew or should have known that the institution was hopelessly insolvent, and that she therefore was entitled to recover the entire amount of her deposits. The district court granted the FDIC's motion for summary judgment and held that petitioner's claims were barred by federal law. Pet. App. B1-B11. First, the court rejected petitioner's reliance on the so-called "hopeless insolvency" doctrine. Relying on *Downriver Community Federal Credit Union* v. *Penn Square Bank*, 879 F.2d 754 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990), the court explained that the federal statutory scheme for the distribution of assets of failed banks limited the liability of the FDIC as receiver with respect to uninsured depositors to the depositor's pro rata share of the assets of the receivership estate. Pet. App. B5-B7 (citing 12 U.S.C. 1821(i) (Supp. III 1991)).

Alternatively, the court ruled that petitioner's reliance on misrepresentations by bank employees was barred by this Court's decision in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and its statutory counterpart, 12 U.S.C. 1823(e) (1988 & Supp. III 1991). The court explained that a claim based on such misrepresentations could prevail against the receiver only if the misrepresentations appeared in an agreement signed by Bankers Trust and made an official record of the bank. Because petitioner could not establish those conditions, the claim failed. Pet. App. B7-B9.

3. The court of appeals affirmed. Pet. App. A1-A9. First, the court held that *D'Oench, Duhme* and

Section 1823(e) bar petitioner's claim, because it rests on alleged misrepresentations by bank personnel and because petitioner failed to show the existence of an agreement that satisfied the statutory requirements of Section 1823(e). The court noted that petitioner's "entire case rests on the theory that the officers of the bank committed a fraud by allowing her to deposit money when they knew the bank was insolvent" and that *D'Oench*, *Duhme* and Section 1823(e) "are directly implicated" by that theory. Pet. App. A4-A5. The court also rejected petitioner's reliance on the hopeless insolvency doctrine, stating that the district court's opinion "ably explains the effect of the hopeless insolvency doctrine * * * and everything else relative to this essentially frivolous ground of appeal." Pet. App. A5.

ARGUMENT

1. Petitioner first argues (Pet. 6-9) that the hopeless insolvency doctrine requires the FDIC to return to her the entire amount of the funds deposited in the failed institution, even if that amount is greater than her pro rata share of the receivership estate. We disagree.

Congress has enacted a detailed statutory scheme describing the manner in which the FDIC shall dispose of the assets of an institution for which it serves as receiver. Under those provisions, the FDIC is obligated to pay "a ratable dividend" of the assets of the receivership estate "on all such claims as may have been proved to [its] satisfaction or adjudicated in a court of competent jurisdiction." 12 U.S.C. 194. Moreover, under 12 U.S.C. 1821(i)(2) (Supp. III 1991), the maximum liability of the FDIC as

receiver is the amount the creditors would have received if the FDIC had liquidated all assets and distributed them pro rata to the creditors. Finally, 12 U.S.C. 1821(i)(1) (Supp. III 1991) contains an express preemption provision, indicating that the allocation of liability established by Section 1821(i) governs "[n]otwithstanding any other provision of Federal law or the law of any State." Collectively, those provisions establish a system under which there is an overwhelming presumption that the FDIC will distribute funds to disappointed depositors on a pro rata basis. Because petitioner's attempt to gain preferential treatment over other depositors flies in the face of that presumption, the court of appeals properly rejected her claim.

The sole federal decision on which petitioner relies (Pet. 6-7) to support her claim is *Downriver Community Federal Credit Union* v. *Penn Square Bank*, 879 F.2d 754 (10th Cir. 1989), cert. denied, 493 U.S. 1070 (1990). In that case, however, the court of appeals rejected a depositor's attempt to secure preferential treatment based on the failed bank's alleged misrepresentations made before appointment of the FDIC as receiver. 879 F.2d at 765. To be sure, the *Downriver* court suggested that such a claim might prevail in some circumstances, *id.* at 762-763, but given the ultimate result of that case, the suggestion was not necessary to the decision.[3] Because petitioner

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[3] In any event, even the *Downriver* opinion makes clear that relief would be available only to any individual who could establish "a false and fraudulent representation made specifically to [that individual]." 879 F.2d at 764. As discussed below, the *D'Oench, Duhme* doctrine bars any attempt by

does not identify any decision of a federal court holding that the relief she seeks would be appropriate, there is no occasion for review by this Court.

2. Petitioner also argues (Pet. 9-13) that the lower courts erred in finding her claim barred by *D'Oench, Duhme* and 12 U.S.C. 1823(e) (1988 & Supp. III 1991). We disagree. In *D'Oench, Duhme*, this Court refused to allow a borrower sued by the FDIC on a note it acquired as receiver of a failed bank to assert as a defense the claim that the note was given "with the understanding that no suit would be brought thereon." 315 U.S. at 456. The Court adopted a federal common-law rule allowing federal banking regulators to enforce notes notwithstanding certain defenses not apparent on the face of the note, relying on the need of regulators to determine the "genuineness of assets ostensibly held by a bank." *Id.* at 460.

The rationale of that decision—as supplemented by its statutory counterpart 12 U.S.C. 1823(e) (1988 & Supp. III 1991)—is squarely applicable here, where petitioner attempts to assert a claim against the receivership estate based on a misrepresentation allegedly made by an employee of the failed institution. The FDIC could not have learned of the misrepresentation by reviewing the books and records of the failed institution, and thus, if petitioner prevailed, the FDIC would be subjected to a deposit liability that was not revealed by the institution's records. Put another way, petitioner—by depositing funds in an account based on the understanding that they would

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petitioner to establish such a representation in this case. Accordingly, petitioner could not prevail even under the dictum articulated in *Downriver*.

have certain insurance protection, but without securing an official agreement to that effect—"lent h[er]self to a scheme or arrangement whereby the banking authority * * * was likely to be misled," 315 U.S. at 460. In those circumstances, it is entirely appropriate to hold petitioner's claim barred.

Contrary to petitioner's suggestion, petitioner cannot evade the *D'Oench, Duhme* doctrine by couching her claim as one for a misrepresentation regarding the treatment of her account, rather than an "agreement" regarding the treatment of her account. That argument would eviscerate *D'Oench, Duhme*, because it would allow a depositor to avoid the doctrine simply by characterizing the employee's statement as a misrepresentation (on which the depositor relied, and with which the depositor apparently agreed) rather than a mutual agreement. Cf. *Langley* v. *FDIC*, 484 U.S. 86, 90-93 (1987) (holding that 12 U.S.C. 1823(e) (1982) applies to misrepresentations, as well as agreements).

Nor can petitioner avoid the rule by suggesting that her claim is established on the records of the bank because those records establish the hopelessly insolvent state of the institution. Under that theory, *every* depositor would be entitled to the return of all funds deposited after the bank became insolvent, a result that would make orderly disposition of the assets of a failed institution impracticable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1993

No. 92-1368

In the Supreme Court of the United States

October Term, 1992

JACQUELINE B. BRUNEAU,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner Jacqueline B. Bruneau seeks the return of funds that were received by a bank when it was hopelessly insolvent. Contrary to the repeated assertions by respondent FDIC, ***this petition does not rest on any oral representations*** that were made to petitioner concerning the insurability of her funds. This petition rests solely upon the hopeless insolvency doctrine. The respondent devotes only one paragraph to this doctrine.

In its cursory treatment of the hopeless insolvency doctrine, the federal respondent resorts to the timeless rhetorical fallacy that if it returns Ms. Bruneau's money it must return everyone's money. To lend credibility to this irrelevancy, the respondent baldly alleges that returning Ms. Bruneau's deposit "would make orderly disposition of the assets of a failed institution impracticable." Respondent's Brief at 7.

The respondent neither pleaded nor proved how this would be the case. Moreover, because it is an equitable doctrine, the hopeless insolvency contains a built-in "reasonable-

ness" limitation in cases where application of the doctrine might disrupt orderly administration or otherwise cause inequity.[1] Thus the appropriate judicial response to Ms. Bruneau's claim is to consider on the merits whether application of the doctrine is warranted, not simply to disregard the doctrine because of the possibility of some imagined inequity or disruption in certain cases.

I. Hopeless Insolvency is the Gravamen of the Petition

No authority cited by the respondent has even questioned the continued validity of the hopeless insolvency doctrine. The Restatement, Restitution § 166 comment b (1937), recites this familiar doctrine:

> So also, if a bank by fraudulent representation, as for example by continuing to do business after it is insolvent to the knowledge of its officers, induces a person to make a deposit in the bank, and the bank fails, the depositor is entitled to priority over other creditors of the bank including depositors who were not defrauded, provided that the depositor is able to trace the money which was deposited (see § 215).[2]

While ignoring the considerable authority cited by petitioner, the federal respondent concedes for the first time that

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1. "Even in the case of hopeless insolvency, however, full restitution may be denied when it would sufficiently disrupt the orderly administration of the receiver's estate or otherwise result in inequitable treatment to other similarly situated depositors." *Downriver Community Federal Credit Union v. Penn Square Bank*, 879 F.2d 754, 762 (10th Cir. 1989), cert. denied, 110 S.Ct. 1112 (1990).

2. Professors Warren A. Seavey and Austin W. Scott are the reporters of the Restatement, Restitution (1937). The American Law Institute's Committee on Restitution included Dean Erwin N. Griswold and Professor Samuel Williston.

Downriver Community Federal Credit Union v. Penn Square Bank, 879 F.2d 754 (10th Cir. 1989), cert. denied, 110 S.Ct. 1112 (1990) suggests that a hopeless insolvency claim "might prevail in some instances." Brief of Respondent at 5.

The federal respondent does not say just what those circumstances are. Nor can the federal respondent explain how Ms. Bruneau can plead a prima facie case under the hopeless insolvency doctrine as set forth in *Downriver*, but nevertheless have her claim for a return of her money barred as a matter of law.[3] Instead of squarely meeting petitioner's legal argument, respondent continues to miscast petitioner's claim as one based upon an oral representation or a side agreement.

Once again, this petition has nothing to do with oral representations or upon an off-the-books, side agreement. Rather, it is based upon the known hopeless insolvency of the bank at the time of Ms. Bruneau's deposit, giving rise to a constructive trust. As *Downriver* makes clear those persons who deposit funds in a hopelessly insolvent bank are entitled to reclaim these trust funds. Id. at 762. *Cf.* Footnote 3 of Respondent's Brief, which misstates the interplay of the hopeless insolvency doctrine and *D'Oench, Duhme.*

II. A Constructive Trust is Not a Preference

Contrary to the protestations of the federal respondent, a return of a "constructive trust" deposit is not a preference. When a bank receives a deposit after it is hopelessly insolvent, title to such funds does not vest in the bank; rather, they remain trust funds. Ms. Bruneau's funds were impressed with a trust from the inception of her "deposit" because the bank was hopelessly insolvent. *See* Brief of Petitioner at p. 7-8.

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3. The FDIC did not challenge the factual sufficiency of Bruneau's claim for relief.

III. The Respondent Seeks to Extend D'Oench, Duhme to All Manner of Cases—Even Cases That Do Not Depend on Unrecorded Side Agreements

The respondent seeks to do more than "merely" overturn the hopeless insolvency doctrine, which for over one hundred years has afforded a remedy to innocent depositors; it also seeks to further expand the reach of *D'Oench, Duhme.*

The respondent would thereby not only abolish the hopeless insolvency doctrine, but would also doom the growing body of federal decisions which hold that *D'Oench, Duhme* does not apply to claims sounding in tort, *e.g.*, claims based on state law misrepresentational torts. *See, e.g., Vernon v. FDIC*, 981 F.2d 1230 at nn. 6-8 (11th Cir. 1993), *reh'g denied*, __ F.2d __ (April 7, 1993) (*Vernon II)* (shareholder suit sounding in common law tort and securities law violations not barred by *D'Oench, Duhme*).[4]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted.

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May 1993

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4. Judge Fay observed in *Vernon II* at n. 8: "We acknowledge there are courts that disagree with our limitation of the doctrine and perhaps the Supreme Court or Congress will shed light on the intended scope of the *D'Oench* decision in the near future."